

What is an Employer to Do? Piercing, Blogging and Tattoos “Oh, My!”

What is a private employer to do when faced with an employee determined to express herself on the job? What if that employee's expression involves tattoos? Piercings? Headscarves? Other body modifications? Can an employer enforce a dress code? These issues are never dull, always awkward and should be addressed before they ever occur.

Tattoos and piercings are "accessories" for certain employees. As more and more of the members of Generation Y enter the workplace, more and more employers are faced with visible tattoos and piercings. Some employers want to completely prohibit tattoos and piercings from the workplace. Others want to pick and choose which are acceptable and which are not. What are the legal limitations on an employer's ability to regulate an employee's self-expression in the workplace? For example, what can you do if the tattoo you want to prohibit is an expression of the employee's religious beliefs?

One way to regulate employees' expression is to implement a policy. Courts will review any policy limiting an employee's ability to express herself to determine whether there is a legitimate business reason for the restrictions. As a general rule, an employer may limit tattoos and piercings in the workplace, if the employer is able to articulate a legitimate business reason for the restriction. For example, a restaurant may restrict its employees from having multiple piercings and require that such piercings be removed when working with food. Employers with dress code or other grooming policies should review their policies frequently and make sure all managers are consistently enforcing the policies. If a policy is not up to date, it is not worth having; and, if a policy is not equally enforced, that policy will do more harm than good.

Recently, the Colorado Anti-Discrimination Act ("CADA") was amended to clarify that dress codes are enforceable, and are not a *de facto* violation of CADA, so long as such policies are enforced unilaterally. As with all policies, uniform application is the key. If employers want to allow certain tattoos, but prohibit others, they must do so mindfully. If an employer generally allows tattoos, but prohibits tattoos that are violent or are tantamount to hate speech, it might open itself up to liability if the subjective decision-making power is exercised arbitrarily. What is offensive to one is acceptable to another, and to interject arbitrary decision-making into a policy is always problematic. This is not to say such policies are always unenforceable or ill-advised, but they can open an employer to greater liability than a uniform policy that prohibits all visible tattoos unless the employer can articulate a legitimate business reason for the distinctions.

Even with uniform application, employers must consider the religious implications of tattoos, piercings and dress codes. If an employee asserts that a tattoo or piercing manifests a religious (or sincerely held) belief or practice, then additional issues come to light. If an employee asserts a religious basis for his piercing or tattoos, an employer must determine whether the request is based upon a sincerely held belief and, if so, whether allowing the exception to the rule would create an undue business hardship. What constitutes a reasonable accommodation of a sincerely held belief or an undue hardship has been the subject of much litigation. So, ask yourself – is this really creating a hardship on my business, or is it

just annoying to me, personally? Am I allowing my bias to create liability for my company, because prohibiting an employee from expressing a sincerely held belief may cause my employer unintended liability under CADA and Title VII. For example, if an employee is a devout member of the Church of Body Modification (described on the Internet), then that employee might be legally entitled to an accommodation. As with all accommodation requests, an employer should engage in an interactive discussion with the employee requesting an exception from the employer's policies before making the determination that no such exception should be granted.

As with many thorny HR issues, uniform implementation of a well-crafted policy will go a long way to smooth employee relations. The issues presented by tattoos, piercings and dress codes are no exception. Implement and follow a well-reasoned policy and you will be well on your way to addressing these thorny issues.

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